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CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 555

C. R. KIRK & COMPANY,

Petitioner,

vs.

THE UNITED STATES.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

The petitioner prays that a writ of certiorari issue to review the judgment of the Court of Claims entered in the subject case on April 7, 1941.

Opinion Below.

The opinion of the Court of Claims is reported in 93 Ct. Cls. —, 37 Fed. Supp. 934.

Jurisdiction.

The special findings of fact, decision and judgment of the Court of Claims were entered on April 7, 1941 (R. 13-21). A motion for a finding responsive to a material issue and for a new trial was filed on May 15, 1941.[1] This

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[1] The court below refused to certify as part of the transcript of record petitioner's motion for a finding responsive to a material issue and for a new trial as requested so to do (R. 19-20). The same is printed as Exhibit B to the brief in support of this petition filed herewith, page 40.

motion was entered on the docket of the court merely as a motion for a new trial and as such was overruled on June 2, 1941 (R. 13). The jurisdiction of the court is invoked under Section 3(b) of the Act of February 13, 1925.

Statutes and Regulations Involved.

The statutes and regulations involved are set out in the Appendix, *infra*, pp. 13-15.

Statement.

The petitioner brought suit in the court below to recover excise taxes paid upon the sales of a coin-operated mechanical device which the Commissioner of Internal Revenue determined to be a "game" within the meaning of the Sporting Goods section of the Revenue Act of 1932, reading as follows:

> Section 609. Tax on Sporting Goods.
>
> "There is hereby imposed upon the following articles, sold by the manufacturer, producer, or importer, a tax equivalent to 10 percentum of the price for which sold: Tennis rackets, tennis racket frames and strings, nets, racket covers and presses, skates, snowshoes, skis, toboggans, canoe paddles, polo mallets, baseball bats, gloves, masks, protectors, shoes and uniforms, football helmets, harness and uniforms, basketball goals and uniforms, golf bags and clubs, balls of all kinds, including baseballs, footballs, tennis, golf, lacrosse, billiard and pool balls, fishing rods and reels, billiard and pool tables, chess and checker boards and pieces, dice, games and parts of games (except playing cards and children's games and toys); and all similar articles commonly and commercially known as sporting goods."

The devices upon the sales of which these taxes were assessed and paid were manufactured and sold during the period February 1 to June 30, 1938 (F. 6-8, R. 10).

Pursuant to the demand of a deputy collector the petitioner was required to file a return for the month of February, 1938, which it did on March 31, 1938, reporting taxes due of $1,092.04. This return was accompanied by a claim for abatement of the full amount shown on the return with interest of $1.82, making a total amount claimed of $1,093.86 (F. 6, R. 10). A similar return for March, April and May, 1938, with a similar claim for abatement in the total amount of $428.85, was filed on June 30, 1938. The return for June, 1938, reflected a net credit on account of returns and allowances and no taxes due (F. 7, R. 10).

The section of the act under which the Commissioner claimed these taxes to be due and payable was repealed as of June 30, 1938 (c. 289, 52 Stat. 447, 568).

Subsequently and on August 10, 1938, the tax liability for March, April, May and June, 1938, was finally determined to be $243.31. This amount was paid on September 19, 1938, at which time a claim for refund thereof was filed on the following ground, among others.

> "The article or device manufactured by the taxpayer was not a sporting good or a game within the meaning of either Section 609, or any other definition of the word GAME as found in the decisions of the various courts or of the various English and legal dictionaries in use today" (F. 8, R. 10).

This claim was rejected in November, 1938. In the meantime the claim for abatement of the February taxes was rejected on September 22, 1938. On October 14, 1938, the petitioner paid taxes and interest on the February sales in the amount of $1,123.54, and on the same day filed a claim for the refund thereof on the same grounds as alleged in the claim for the earlier months. This claim was rejected on January 18, 1939 (F. 8, R. 10-11).

In the petition filed in the court below the petitioner alleged that the device herein involved was not a "game"

within the meaning of the pertinent provisions of the revenue statute in that:

1. It could be operated by only one person at a time;

2. Was in no sense an instrumentality for the playing of a game of contest; and

3. Was not similar in any respect to any of the articles enumerated in the taxing statutes or to other articles commonly and commercially known as "Sporting Goods" (¶ IX, R. 5).

The respondent answered by the filing of a general traverse, and the case was referred to a Commissioner of the court below for the taking of proof and the rendering of a report with proposed findings of fact based on the evidence. The Commissioner filed his report with proposed findings on October 21, 1940.

Pursuant to the rule of the Court of Claims,[2] and within the time prescribed therein the petitioner requested the court below to adopt the report of the Commissioner and include it in its special findings of fact.[3]

The Court included in the special findings of fact all of the material evidentiary findings proposed by the Commis-

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[2] Rule 76(a) Ct. Cls. In any case in which the commissioner of the court has made a report of his findings, either party requesting a special finding of facts, as provided for in the foregoing rule, shall, within the time allowed by Rule 46 for filing briefs, make such request in the following terms: "The plaintiff (or the defendant as the case may be) considering the facts set forth in the report of the commissioner of the court, as modified by the exceptions herein set forth (if any exceptions are taken), to be proven and deeming them material to the due presentation of this case, requests the court to include the same in a special finding of facts."

[3] The court below refused to certify as part of the transcript of record petitioner's request for findings, including the Report of the Commissioner incorporated therein by reference, as requested so to do (R. 19-20). The request for findings, including the Report of the Commissioner, is printed as Exhibit A to the brief in support of this petition filed herewith, page 32.

sioner and requested by the petitioner except the very material and responsive finding reading as follows:

> "The Blow Ball machines were not included among the instrumentalities for playing games ordinarily sold by establishments specializing in the sale of sporting goods and athletic equipment and in general they were dissimilar to such instrumentalities, as well as to the instrumentalities for playing games or contests specifically mentioned in Section 609 of the Revenue Act of 1932" (F. 14).[4]

This finding was the only one directly responsive to the issue raised in paragraph IX of the petition. The Court not only refused to adopt this proposed and requested finding but failed and refused to make any finding responsive to this issue yet concluded as a matter of law petitioner was not entitled to recover (R. 11).

All of the evidentiary findings pertinent to this issue as proposed by the Commissioner, requested by the petitioner and adopted by the court below may be briefly summarized.

The machine could be operated by only one person at a time (F. 2, R. 8). No rules were issued governing the manner in which the machines were to be used by the persons who operated them. Petitioner offered no prizes, awards, or inducements to encourage the use of the machines. The coin mechanism was not necessary to their operation, and was provided only for the purpose of collecting rental for the use of the machines from those who operated them. No pay-out device was provided on the machines (F. 2, R. 8). Petitioner sold the machines outright, retaining no interest in them and placing no restrictions on their use or operation (F. 3, R. 9).

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[4] The court below refused to certify as part of the transcript of record the Report of the Commissioner with petitioner's request for findings as requested so to do (R. 19-20). Printed as part of Exhibit A to the brief in support of this petition filed herewith, page 38.

With respect to the secondary issue the evidentiary findings pertinent hereto and proposed by the Commissioner, requested by the petitioner and adopted by the court below may be briefly summarized.

The price at which the machines were sold was fixed by taking into consideration the cost of manufacture, overhead and selling costs, and a reasonable profit, together with a consideration of what the machine could be sold for in competition, that is, what the traffic would bear for that type of machine. The price was fixed at a time when petitioner was of the opinion that sales of the machine were not subject to the excise tax and the price was not changed as a result of the demand by the collector for the payment of an excise tax thereon. In preparing the returns petitioner used the 1/11 method of computing the tax. This was the basis used by the collector in determining the petitioner's tax liability. The taxes were all paid from the general funds of the company (F. 4, R. 9).

On the basis of the foregoing evidentiary findings the court below made the wholly inconsistent and contradictory ultimate finding "The plaintiff passed on to its customers the tax for which it sues in this case" (F. 5, R. 9).

On May 15, 1941, petitioner filed a *Motion for a Finding Responsive to a Material Issue and for a New Trial.*[5] The filing of this motion was entered on the docket of the Court below merely as a *Motion for New Trial* and as such was overruled without comment on June 2, 1941 (R. 13).

Devices of the type herein involved were subject to an excise tax under the provisions of Section 600(8), Title VI, of the Revenue Act of 1924 (c. 234, 43 Stat. 253, 323).[6] This

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[5] Not certified as part of the transcript of record by the court below as requested so to do (R. 19-20). Printed as Exhibit B to the brief in support of this petition filed herewith, page 40.

[6] Sec. 600. On and after the expiration of thirty days after the enactment of this Act there shall be levied, assessed, collected and paid upon the following articles sold or leased by the manufacturer, producer, or importer,

section was expressly repealed as of February 26, 1926, by Section 1200(a), Title VI, of the Revenue Act of 1926 (c. 27, 44 Stat. 9, 125-127).[7] This was twelve (12) years prior to the beginning of the period here involved and the tax had not been revived by any subsequent legislation.[8]

Questions Presented.

1. Whether the Court of Claims, in a case where both parties request in writing at the time the case is submitted to the court that the facts be specially found, all in accordance with Rule 76(a) of that court, may properly refuse and fail to make a finding responsive to a primary and material issue?

2. Whether a coin-operated mechanical device that can be operated by only one person at a time and which may not be properly included among the list of instrumentalities for playing games ordinarily sold by establishments specializing in the sale of sporting goods and athletic equipment and, in general, is dissimilar to such instrumentalities as well as to the instrumentalities for playing games or contests specifically mentioned in Section 609 of the Revenue Act of 1932, titled "Sporting Goods", is taxable as a "game" within the meaning of that section of the statute?

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a tax equivalent to the following percentages of the price for which sold or leased. * * *

8. Coin-operated devices, coin-operated machines, and devices and machines operated by any substitute for a coin, 5 percentum; of the manufacturer, producer, or importer of any such device or machine operated for profit, he shall pay a tax in respect of each such device or machine put into operation equivalent to 5 percentum of its fair market value.

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[7] Sec. 1200(a). The following parts of the Revenue Act of 1924 are repealed, to take effect (except as otherwise provided in this Act) upon the enactment of this Act. * * *

Title VI called "Excise Taxes", except subdivision (2) of section 600. (Exception related to automobile chassis, bodies and motorcycles.)

[8] The proposed Revenue Act of 1941, proposes a $25.00 a year use tax on coin-operated Amusement and Gaming Devices, and a 10% manufacturer's excise tax on Sporting Goods. (H. R. 5417, 77th Cong., 1st Sess., Aug. 4, 1941.)

3. Whether the Court of Claims was correct, as a matter of law, in making the ultimate finding of fact that "The plaintiff passed on to its customers the tax for which it sues in this case" (F. 5, R. 9), on the basis of the evidentiary facts of its own finding that:

a. The price at which the machines were sold was fixed by taking into consideration the cost of manufacture, overhead, and selling costs, and a reasonable profit, together with a consideration of what the machine could be sold for in competition (F. 4, R. 9).

b. The price was fixed at a time when the plaintiff was of the opinion that the sales of the machine were not subject to the excise tax and the price was not changed as a result of the demand by the collector for the payment of an excise tax thereon (F. 4, R. 9).

c. The earliest determination by the Commissioner that the sales were subject to the tax and the amount of tax to be assessed was made more than two months after the repeal of the statute under the provisions of which the taxes were assessed and paid (F. 8, R. 10-11).

d. The taxes, when paid, were paid from the general funds of the company (F. 4, R. 9).

4. Whether the Commissioner of Internal Revenue, by regulation alone, may revive the provisions of an earlier excise tax statute (Coin-operated devices) that had been expressly repealed by Congress, and make them applicable to an entirely different section of the taxing statute (Sporting Goods) that Congress had seen fit to deal with separately and to first enact,[9] then amend,[10] then repeal [11] and later revive by specific legislation.[12]

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[9] Section 600(f), Title VI, Revenue Act of 1917; c. 63, 40 Stat. 300, 316-318.

[10] Section 900(5), Title IX, Revenue Act of 1918; c. 18, 40 Stat. 1057, 1122-1126.

[11] Section 1400, Title XIV, Revenue Act of 1921; c. 136, 42 Stat. 227, 321.

[12] Section 609, Title IV, Revenue Act of 1932; c. 209, 47 Stat. 169, 264.

Specification of Errors to be Urged.

The court below erred:

1. In failing and refusing to meet and dispose of the primary issue involved by making a finding responsive to it.

2. In concluding that the mechanical device herein involved was taxable under the Sporting Goods section of the Revenue Act of 1932, without findings evidentiary or ultimate to support such a conclusion.

3. In failing and refusing to accept this Court's construction of the phrase "games and parts of games" as used in Section 609 of the Revenue Act of 1932, and followed consistently by the Circuit Courts of Appeals for the Third and Seventh Circuits.

4. In failing and refusing to make a definite finding that the mechanical device herein involved is not an instrumentality used in games of contest like the specific articles named in the taxing statute, and the further definite finding that the device is not similar either to the other articles enumerated in the statute or to any other article commonly and commercially known as Sporting Goods.

5. In making the ultimate finding that the petitioner passed on to its customers the taxes for which the court found the petitioner had made no provision for the collection of and all of which were paid from the general funds of the company.

6. In failing and refusing to make the specific and ultimate finding that petitioner paid and bore the economic burden of the taxes herein sought to be recovered.

7. In failing to keep a full and complete record of the pleadings filed in this proceeding.

8. In concluding that the petitioner is not entitled to recover and in entering judgment against the petitioner.

Reasons for Granting the Writ.

I.

The allegations set forth in paragraph IX of the petition raises a material issue and it is reversible error on the part of the Court of Claims in failing and refusing to make a finding responsive to it. *Universal Battery Co.* v. *United States,* 281 U. S. 580, 584.

II.

The evidence (R. 13-19) adequately supports and will permit of no finding other than the responsive finding proposed by the Commissioner and duly requested by the petitioner in strict compliance with the rule of the trial court.

III.

The primary question involved and the one with respect to which the court below failed and refused to make a responsive finding is of substantial and special public importance. The case at bar is one of approximately forty cases in suit in the District Court and Court of Claims, or pending before the Commissioner of Internal Revenue on claims for refunds, in which the total amount involved is in excess of three million dollars ($3,000,000.00).

IV.

There is a sharp and irreconcilable conflict between the decision in the subject case and a prior decision of this Court construing the section of the taxing statute here involved, as well as between the decision below and the decisions of two of the Circuit Courts of Appeals both of which adopted and followed the prior and controlling decision of this Court.

White v. *Aronson,* 302 U. S. 16;

The Brunswicke-Balke-Collander Co. v. *Harrison* (C. C. A. 7th), 116 F. (2d) 786;

Chicago Flag and Decorating Co. v. *U. S.* (C. C. A. 7th), 119 F. (2d) 413;

Darby & Son, Inc. v. *Rothensies* (C. C. A. 3rd), 116 F. (2d) 268.

V.

Without the aid of this Court, through the issuance of the writ of certiorari and entry of an order remanding the case to the Court of Claims with directions to perform its judicial duty and make a finding responsive to the primary issue, the petitioner will be forever barred from a trial of the primary issue on the merits in this case, and the full purport and tenor of the construction placed on the phrase "games and parts of games", as used in Section 609 of the Revenue Act of 1932, by this Court will remain in doubt and the conflict in the decisions remain unreconciled.

VI.

The ultimate finding of fact on the secondary issue, when considered in the light of the evidentiary findings with which it is associated, is in sharp and irreconcilable conflict with the controlling decision of this Court and with numerous decisions of the Circuit Courts of Appeals and District Courts in all of which the test applied by this Court in the controlling decision has been adopted and followed with a uniformity of logic and reasoning.

Jefferson Electric Co. v. *United States*, 291 U. S. 286;

Duradene Co. v. *Magruder* (C. C. A. 4th), 95 F. (2d) 999;

Luzier's Inc. v. *Nee* (C. C. A. 8th), 106 F. (2d) 135;

Samuel B. Bierman v. *Shea* (D. C. N. Y.), 28 Fed. Supp. 213;

Con-Rod Exchange Inc. v. *Hendrickson* (D. C. Wash.), 27 Fed. Supp. 427;

The Andrew Jergens Co. v. *Conner* (D. C. Ohio), 31 Fed. Supp. 61.

VII.

Only by a granting of this application and the issuance of a writ of certiorari can the wholly inconsistent and contradictory ultimate finding of the court below on the secondary issue be set aside and an ultimate finding consistent with the evidentiary findings be directed.

WHEREFORE, it is respectfully submitted that the petition should be granted.

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